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State v. Davis Respondent's Brief Dckt. 40244

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 40244
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2010-3848
)	
TRACY LORENE DAVIS,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE KATHRYN A. STICKLEN
District Judge**

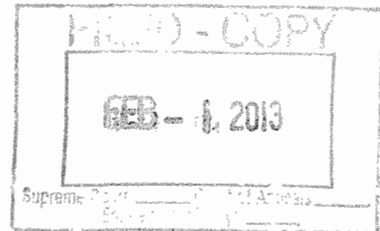
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STATEMENT OF THE CASE

Nature of the Case

This case is before the Court on appeal from a decision by the district court, in its appellate capacity, affirming a jury's judgment of conviction against Tracy Davis for driving under the influence.

Statement of Facts and Course of Proceedings

In March 2010, Tracy Davis caught the attention of Officer Rhoades when she failed to signal two lane changes and a right-hand turn. (Tr., p. 38, L. 4 – p. 39, L. 8.) The officer pulled Davis over, and noted her watery, blood-shot eyes and an odor of alcohol. (Tr., p. 40, Ls. 7-10.) Davis failed three field sobriety tests and was taken to the Meridian Police Department where she gave breath tests of .087 and .090 on the Intoxilyzer 5000. (See Tr., p. 42, L. 13 – p. 67, L. 6.) Davis was ultimately charged with, and went to jury trial for, driving under the influence (DUI). (R., pp. 7, 55-56, 98-106.)

Before the jury was selected for Davis's trial in magistrate court, she sought to admit parts of the audio recording from her DUI investigation. (See Tr., p. 20, Ls. 13-17; p. 22, L. 13 – p. 23, L. 10.) The state objected that Davis's statements in the recording were hearsay. (Tr., p. 21, Ls. 7-24.) The magistrate court sustained the objection, noting that, to be admitted, anything Davis said in the recording would have to be excluded or redacted. (Tr., p. 23, Ls. 13-14, 19-22.)

Also before jury selection, the state asked that the court prohibit examination of Officer Rhoades concerning his comment about Davis's BAC

level, absent foundation of the officer's expertise on the issue. (Tr., p. 12, L. 22 – p. 13, L. 14.) The magistrate court ruled that, when Officer Rhoades took the stand, Davis's counsel could inquire regarding the statement so long as he established a foundation for his inquiry. (Tr., p. 17, Ls. 14-17.)

At the conclusion of trial, the jury returned a guilty verdict. (R., p. 130.) The magistrate court entered judgment against Davis (R., p. 209), and Davis appealed to the Fourth Judicial District Court (R., pp. 213-15). In her supporting brief, Davis raised two challenges: (1) that the magistrate court erred in excluding as hearsay, portions of the audio recording, where they were not offered for the proof of the matter asserted; and (2) that the magistrate court's decision to exclude cross-examination of Officer Rhoades did not result from an exercise of reason. (R., pp. 228-37.)

The district court rejected Davis's arguments and denied the appeal. (R., pp. 267-75.) Davis timely appealed the district court's order to this Court. (R., pp. 277-79.)

ISSUES

Davis states the issues on appeal as:

1. Where defense counsel provide a specific basis to dispute the state's objection on the record at the time of trial, did the district court err in ruling that defense failed to adequately preserve the evidentiary issue regarding exclusion of the audio recording?
2. Where defense counsel countered the State's objection at the time it was raised, did the district court err in ruling that defense counsel failed to adequately preserve the evidentiary issue regarding the Officer's statement that the appellant's blood-alcohol level was likely "on [the] way up" when she submitted to the breath test?

(Appellant's brief, p. 8.)

The state rephrases the issues as:

1. Has Davis failed to show that the district court erred in affirming the trial court where Davis failed to create a record on which a reviewing court could adequately find error in the trial court's exclusion of evidence?
2. Has Davis failed to show that the district court erred where it affirmed the trial court's ruling, allowing counsel to cross-examine Officer Rhoades after laying foundation, but where Davis made no attempt to lay foundation or otherwise pursue the officer's cross-examination on the disputed topic?

STANDARD OF REVIEW

The appellate court directly reviews a decision by the district court made in its appellate capacity. State v. Decker, 152 Idaho 142, 145, 267 P.3d 729, 732 (Ct. App. 2011) (citation omitted). The appellate court examines the magistrate record “to determine whether there is substantial and competent evidence to support the magistrate’s findings of fact and whether the magistrate’s conclusions of law follow from those findings.” Id. Findings by the trial court that are supported by substantial evidence will not be disturbed on appeal. State v. Green, 149 Idaho 706, 708, 239 P.3d 811, 813 (Ct. App. 2010). However, the appellate court freely reviews legal questions. Id. Where the magistrate’s findings and conclusions are deemed supported by the record and law, and where the district court affirmed the magistrate court, the appellate court will also affirm “as a matter of procedure.” Id.; Decker, 152 Idaho at 145, 267 P.3d at 732.

ARGUMENT

I.

Davis Has Failed To Show That The District Court Erred In Affirming the Trial Court Where Davis Failed To Create A Record On Which A Reviewing Court Could Adequately Find Error In The Trial Court’s Exclusion Of Evidence

A. Introduction

Davis challenges the district court’s decision affirming the magistrate court’s exclusion of evidence for Davis’s failure “to adequately preserve the evidentiary issue.” (Appellant’s brief, p. 8.) At trial, Davis argued that the audio recording should be admitted as non-hearsay. (Tr., p. 25, Ls. 7-10.) But on

detailed examination of the record, Idaho law supports both the magistrate and district courts' decisions.

B. Davis Failed To Make An Offer Of Proof On Which A Reviewing Court Could Determine That The Trial Court Erred

A trial court's error "may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the *substance of the evidence was made known to the court by offer* or was apparent from the context within which questions were asked." Idaho R. Evid. 103(a)(2) (emphasis added). Absent an offer by the party seeking to admit evidence of what the evidence would have shown, a trial court's ruling excluding the evidence will not be disturbed. State v. Schoonover, 125 Idaho 953, 954-55, 877 P.2d 924, 925-26 (Ct. App. 1994). This rule follows the long-standing policy that "a party assigning error must make a sufficient record from which an appellate court can adequately determine whether there was error." State v. Pentico, 151 Idaho 906, 915, 265 P.3d 519, 528 (Ct. App. 2011); see also State v. Wright, 153 Idaho 478, ___, 283 P.3d 795, 800 (Ct. App. 2012) (a defendant's objection at trial must be apparent from context or clearly stated with specific grounds, to be preserved for appellate review).

Careful review of the transcript from trial reveals that the state offered far more detail in objecting to admitting the entire audio disk:

[T]here are hearsay statements that the defendant made . . . [f]or instance, she describes how much water she drank in addition to her two glasses of wine.

(Tr., p. 21, Ls. 9-10, 14-15; p. 21, L. 24 – p. 22, L. 1.) In contrast, Davis's counsel fails to make an offer that adequately supports admission of the recording as non-hearsay. Counsel acknowledged that the recording was "definitely statements by my client that she made that night" and stated that he wished to play "portions" of the recording, specifically "from the beginning of the stop to the end of the field sobriety tests," but not including subsequent breath testing. (Tr., p. 22, Ls. 17-24.) The only grounds stated at this time for not excluding the evidence was that it was a "recording of – of what happened." (Tr., p. 23, L. 8.)

The magistrate court sustained the state's hearsay objection to anything Davis said in the recording, noting that her statements would have to be excluded or redacted. (Tr., p. 23, Ls. 13-14, 19-22.) Later, Davis re-raised the issue to "make a formal record," asserting, "it's the defense position that . . . this does not fall . . . within hearsay, as it's not offered for the truth of the matter asserted." (Tr., p. 25, Ls. 3-8.) The prosecutor responded that defendant's statements on the recording would only be useful for their truth, giving examples. (Tr., p. 25, L. 20 – p. 26, L. 24.) The trial court then affirmed its ruling. (Tr., p. 26, L. 25 – p. 27, L. 19.)

On review by the district court, Davis raised for the first time, two non-hearsay purposes for the audio recording: (1) as a time-line of the investigation;

and (2) to impeach Officer Rhoades. (Appellant's brief, pp. 270-71.¹) Given the record, there is no basis to conclude that the magistrate judge erred in rejecting these two non-hearsay purposes because the purposes were never before him. See Pentico, 151 Idaho at 915, 265 P.3d at 528. Davis has failed to show error in the district court's appellate ruling that because trial counsel did not claim the recording was admissible to establish a time-line or to impeach the officer, those claims were not preserved for appeal.

C. Any Error In Excluding The Recording Was Harmless Given That Davis Chose To, And Did Testify At Trial

Even if Davis's counsel had offered these non-hearsay purposes on the record, any error resulting from the recording's exclusion was harmless. Under the harmless error test, "once a defendant shows a constitutional violation occurred, the State has the burden of demonstrating beyond a reasonable doubt that the violation did not contribute to the verdict." State v. Adamcik, 152 Idaho 445, 472, 272 P.3d 417, 444 (2012) (citing State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010)). Here, Davis does not assert – nor could she show – that the trial court's exclusion of the audio recording was a constitutional violation. But even if she could show a constitutional violation, the record demonstrates, beyond a reasonable doubt, that the recording's exclusion did not

¹ Davis argues that her argument was adequately preserved under State v. Guitierrez, 143 Idaho 289, 292, 141 P.3d 1158 (Ct. App. 2006). (Appellant's brief, pp. 11-12.) However, Guitierrez concerned whether an objection to opposing counsel's question was sufficiently preserved absent specific citation to the applicable rule of evidence. Guitierrez, 143 Idaho at 292, 141 P.3d at 1161. The issue here is not whether Davis cited the hearsay rule, but whether she established a non-hearsay basis for admitting the recording.

contribute to the verdict. This is because Davis testified at her trial. (Tr., p. 163, L. 11 – p. 185, L. 13.)

Any facts that Davis sought to establish through the recording of her police stop could have been elicited through her own testimony. The record includes no offer from Davis's counsel that the recording contained non-hearsay evidence that could not be established through her testimony.² There is no assertion she testified involuntarily. Based on the record and case law stated herein, Davis has failed to show error by the magistrate court in excluding the audio recording, and by the district court in affirming that decision. The errors claimed by Davis were necessarily harmless.

II.

Davis Has Failed To Show That The District Court Erred Where It Affirmed The Trial Court's Ruling, Allowing Counsel To Cross-Examine Officer Rhoades After Laying Foundation, But Where Davis Made No Attempt To Lay Foundation Or Otherwise Pursue The Officer's Cross-Examination On The Disputed Topic

A. Introduction

Davis also challenges the district court's finding that she failed to preserve her objection to the trial court's decision excluding cross-examination of Officer Rhoades regarding his comment about her BAC level. According to Davis, defense counsel's contextual statements responding to the state's objection provided sufficient basis to preserve her challenge on appeal. The record does not support Davis's argument.

² Indeed, counsel's comments to the trial court arguably acknowledge that Davis's testimony would be duplicative of the recording. (Tr., p. 23, Ls. 6-7.)

B. The Record Does Not Show An Attempt To Lay A Foundation For Questioning Officer Rhoades Regarding His Comment About Davis's BAC Level

As noted above, the Idaho Court of Appeals has held that, to preserve appeal of an evidentiary ruling, the party challenging the ruling must make a sufficient record from which a reviewing court can determine error. Pentico, 151 Idaho at 915, 265 P.3d at 528. Davis did not do so here.

Before jury selection, the state asked the trial court to prohibit examination of Officer Rhoades regarding his comment on Davis's BAC level, absent foundation of the officer's expertise on the issue. (Tr., p. 13, Ls. 3-14.) Davis's counsel responded that, to exclude it would be highly prejudicial to Davis, given its relevance and probative value. (Tr., p. 17, Ls. 3-6.) The magistrate court ruled that, when Officer Rhoades took the stand, Davis's counsel would be allowed to inquire about the comment if he laid a foundation. (Tr., p. 17, Ls. 14-17.)

The district court concluded on appeal that Davis abandoned the issue by not trying to lay foundation for the proposed testimony. (R., p. 274.) Davis argues the district court erred because her counsel "attempted to lay foundation" at trial, but the state "raised a non-specific objection," and this was sustained by the trial court "on non-specific grounds." (Appellant's brief, p. 13.) In support, Davis cites the following exchange from the trial transcript. First, Davis's counsel asked Officer Rhoades:

Okay. So if a person coughs with alcohol . . . in their lungs, wouldn't that bring . . . alcohol to a person's mouth, as well?

(Tr., p. 102, Ls. 6-8.) The prosecutor then interjected:

Objection, Your Honor. Facts not in evidence and . . . I don't think the officer has specific knowledge. And, also, alcohol is not in someone's lungs. I don't know what objection that is, but . . . you're throwing facts into your questions that have not been established.

(Tr., p. 102, Ls. 9-14.) The magistrate judge then said:

All right. Well, I'll sustain the objection to the question as asked.

(Tr., p. 102, Ls. 15-16.)

For purposes of establishing a record on appeal, nothing defense counsel said in this exchange can be deemed an attempt to lay foundation for Officer Rhoades to testify about whether a person's BAC level would be rising or falling at the time of a breath test. In fact, moments before, counsel asked the officer, "would a person coughing . . . bring alcohol up from the lungs into the mouth?" (Tr., p. 101, Ls. 17-19); to which Officer Rhoades responded, "No, I don't believe so." (Tr., p. 101, L. 20.) From the transcript, it appears Davis's counsel was attempting to impeach the BAC evidence, not lay foundation for the officer to testify about whether Davis's BAC was rising between the stop and her BAC test.

The record does not support that the trial court denied counsel the ability to examine Officer Rhoades regarding rising BAC levels. Rather, the record shows that Davis's counsel did not attempt to lay a foundation or otherwise pursue this line of questioning. Defense counsel did not establish a sufficient trial record for this Court to conclude otherwise on appeal. Therefore, Davis's second argument also fails.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the Court affirm the district court's decision.

DATED this 1st day of February, 2013.



DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of February, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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DJH/pm